IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 225 of 2005

For Approval and Signature:

HON'BLE MR. JUSTICE M.D. SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BATUK DEVSHANKER CHAU

Versus

THE STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 225 of 2005

DHARMESH D NANAVATY for Petitioner No. 1

MR KP RAVAL ADDL PP for Respondent No. 1

CORAM : HON'BLE MR. JUSTICE M.D. SHAH

Date of decision: 10/05/2005

ORAL JUDGEMENT

Heard Mr. Dharmesh Nanavati, learned advocate for the applicant and Mr. K.P. Raval, learned Addl.P.P. for the respondent State.

2. Rule. Mr. Raval, learned Addl.P.P. waives service of Rule on behalf of respondent State. With the consent of the counsel appearing in the matter, matter is taken up for final hearing.

3. The learned Additional Sessions Judge, Fast Track Court, Gondal while recording deposition of witness Harishchandra Ichchharam Trivedi at Ex. 41 in Sessions Case No. 66 of 2000, the learned Additional Sessions Judge, Fast Track Court, Gondal has held that statement Ex.42, which is a FIR of Sejalben daughter of Gopalbhai Narshibhai recorded by the PSI Shri Harishchandra Ichchharam Trivedi on 23.11.1999 in connection with I.CR. No. 119 of 1999 registered before the Rajkot Rural Police Station against one of the accused Batukbhai Devshankar for the offences under Section 376 of the IPC is Dying Declaration under Section 32 (1) of the Indian Evidence Act and rejected the objection raised by the defence and against the said order, the present revision application is preferred by the present applicant.

4. In brief, it is the case of the prosecution that deceased Sejalben Gopalbhai Patel was raped by one Shri Batukbhai and thenafter, she was conceived. She received pain and therefore, her father and mother brought her to the hospital of Dr. Kishorbhai Patel, where she was treated by Doctor and doctor has administered two injections for abortion of the foetus and thereafter, again she received pain and she went for natural call and at that time, foetus was collapsed. Thereafter, Sejalben was again admitted in Rajkot Government Hospital, where she had given complaint against Batukbhai for the offence under Section 376 of the IPC. On the basis of that, offence was registered and present applicant was chargesheeted and thenafter, learned JMFC under Section 209 of the Code of Criminal Procedure committed the said case before the learned Sessions Judge as learned JMFC has no jurisdiction to try the said case. Thereafter, the said case is numbered as Sessions Case No. 66 of 2000 and during recording of evidence of Investigating Officer, Harishchandra Ichchharambhai Trivedi, the above mentioned complaint is exhibited at Ex.42 and learned Additional Sessions Judge has held that this complaint be treated as Dying Declaration under Section 32 (1) of the Indian Evidence Act and against the said order, the present applicant has filed this revision application.

5. It is submitted by Mr. Nanavati, learned advocate for the applicant that so far as exhibiting the said FIR at Ex. 42 is concerned, he has no objection but

as it is held by learned Additional Sessions Judge that said Ex. 42 be treated as Dying Declaration is not permissible under law. Section 32 (1) of the Evidence Act reads as under :-

"Section 32 (1) : When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question or is made in course of business."

From the plain reading of Section 32 (1) of the Indian Evidence Act, it is crystal clear that when the statement is made by the person as to the cause of his or her death as to any of the circumstances of the transaction, which resulted into death, then in that case, it can be considered as Dying Declaration.

6. So far as Ex. 42 is concerned, it transpires that statement made by deceased Sejalben is not pertaining to the cause of her death. So, in my opinion, Ex. 42 i.e. statement of Sejalben at this juncture cannot be treated as dying declaration and hence learned Additional Sessions Judge has committed error in holding that Ex.42 is a Dying Declaration of deceased Sejalben and this part of the order is hereby set aside and it is clarified that the said Ex. 42 be used only as a piece of evidence under the provisions of the Indian Evidence Act, 1872.

7. For the foregoing reasons, revision application is partly allowed. Rule is made absolute in above terms. Direct service permitted.

(M.D. Shah, J.)

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